MOTION FILED FEB 4 1955 LIBRARY SUPREME COURT, U.S.

No. 451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner

v.

ALLENTOWN BROADCASTING CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF EASTON PUBLISHING COMPANY

and

AMICUS CURIAE BRIEF OF EASTON PUBLISHING COMPANY

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February 4, 1955

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Easton Publishing Company is vitally interested in the outcome of this proceeding because the majority decision of the United States Court of Appeals for the District of Columbia Circuit here to be reviewed reversed a decision and order of the Federal Communications Commission which granted the Easton Publishing Company's application for broadcasting facilities in Easton, Pennsylvania, and denied a conflicting application of respondent, Allentown Broadcasting Corporation, for identical facilities in Allentown, Pennsylvania. Therefore, the propriety of the

grant of the Easton application may be finally determined as a result of this review.*

The Solicitor General, on behalf of the petitioner, has given his consent to the filing of an amicus curiae brief by the Easton Publishing Company, but the Allentown Broadcasting Corporation has refused consent. Hence this motion.

There is one question of law which was not presented by the Federal Communications Commission below and which, as evidenced by the Petition for a Writ of Certiorari herein, apparently will not be presented to this Court, but which it is believed is not only relevant but important because it is founded upon an opinion of this Court which was disregarded by the lower court. The opinion in question is that in *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U. S. 470, where, inter alia, it was stated, in effect, that Congress intended to make broadcasting a competitive business—a mandate to which the Commission's decision herein gives effect, but which the majority decision of the lower court would circumvent.

WHEREFORE, leave is requested to file the accompanying amicus curiae brief of the Easton Publishing Company.

Respectfully submitted,

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February 4, 1955

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* The Easton Publishing Company was an intervener in the first of the two consolidated appeals before the lower court. The Company, inadvertently, did not intervene in the second appeal. However, it filed a brief and participated in the oral argument. The first appeal was dismissed as premature at the same time that the second appeal was decided favorably to the appellant, Allentown Broadcasting Corporation, respondent herein.

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INTEREST OF THE EASTON PUBLISHING COMPANY

The interest of the Easton Publishing Company, hereinafter often called Easton, in this proceeding lies in the fact that the majority decision of the lower court here to be reviewed would reverse the decision and order of the Federal Communications Commission granting Easton's application for broadcast facilities.

ARGUMENT

This proceeding before the Federal Communications Commission required a choice to be made between two conflicting applicants, Allentown Broadcasting Corporation and Easton Publishing Company, for identical standard broadcast facilities, one to operate in Allentown and the other in Easton, Pennsylvania. Therefore, the primary consideration was necessarily the requirement of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b), that broadcast facilities be so distributed "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *

The first (1947) decision of the Commission was in favor of Allentown (Record, p. 18), but the Court of Appeals could not tell from the findings what caused the Commission to hold that the need of the Allentown community for additional radio facilities was greater than that of Easton and so remanded the case for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need." *Easton Publishing Company v. Federal Communications Commission*, 85 U. S. App. D. C. 33, 40. In its opinion the lower court referred to the decision of this Court in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, and stated (85 U. S. App. D. C. at 35) that this Court had there "made clear . . . that Congress intended to make broadcasting a competitive business". The lower court then continued:

> " . . . It [the Supreme Court] said (309 U. S. at 475): 'In short, the broadcasting field is open to any-

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* Section 307(b) provides, in full, as follows:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

> one, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.' Under that view of the statute, the public interest, convenience and necessity to which the Act refers are served by *effective competition among strong competitors. Competition, of course, is between broadcasters on different frequencies covering the same area. . . .*" (Emphasis supplied.)

After the remand of the case the Commission held a further hearing and then found that Easton was in greater need than Allentown for new radio service. (R. 211.) *A fortiori*, the Easton Publishing Company was found to be the better able to serve the greater need because it alone proposed primarily to serve Easton, and so the Commission granted Easton's application. (R. 214.) The factor which the Commission considered decisive in requiring the conclusion that Easton had the greater need was the importance of a *choice between locally-originated programs.* Easton had and has only one standard broadcast station whereas Allentown had and has several. (R. 211-212.) Therefore, only by the establishment of another such station in Easton could such a choice be made possible.

This conclusion of the Commission was also in conformity with the need for competition which this Court recognized in the *Sanders* case, supra, as expressing the Congressional intention and which the lower court, in its first decision, also considered important. Significantly, the *Sanders* case involved the communities of Dubuque, Iowa, and East Dubuque, Illinois. Station WKBB was the only broadcast facility in East Dubuque and the Telegraph Herald was the only local daily non-sectarian newspaper in Dubuque. The Telegraph Herald was seeking a new broadcast facility in Dubuque, while WKBB desired to move from East Dubuque across the river to Dubuque. Station WKBB intervened in the Telegraph Herald case upon the contention that there was not sufficient business in Dubuque to support

two stations. The applications were heard in a consolidated proceeding. The examiner who heard the case recommended the grant of the WKBB application and the denial of that of the Telegraph Herald although they were not mutually exclusive insofar as electrical interference was concerned. However, the Commission held that both applications should be granted. On appeal by Sanders Bros. (WKBB) the lower court reversed the Commission, holding that one of the issues that should have been tried was that of alleged economic injury to WKBB. *Sanders Bros. Radio Station v. F. C. C.*, 106 F. 2d 321.

This Court reversed the lower court and held that economic injury is not by itself an element that the Commission must weigh and as to which it must make findings. The Court then stated, as above noted, that "the broadcasting field is open to anyone" provided that there is an available frequency and he "shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." This Court went on to observe that—

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

Thus there were allowed to be established in Dubuque, as the result of the decision of this Court, two radio stations, one owned by the only local non-sectarian daily newspaper. This brought about competition between stations broadcasting on different frequencies and covering substantially the same area.

In the case at bar the Easton Publishing Company is seeking to establish a local broadcast station to operate in competition with WEST, the only other station there. WEST is not a party to the proceeding; it claims no threat-

ened economic injury. The conflicting application of respondent seeks to establish a fourth station in Allentown (a fifth in the Allentown community, including adjacent Bethlehem). (R. 211-212.) The Commission found both applicants to be legally, financially, and technically qualified (R. 209); that is, to use the language of this Court in the *Sanders* case, each had shown "his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

In Allentown there is already a choice of local standard broadcast programs provided by stations that are in competition with each other. In Easton there is no choice of local broadcast programs, and WEST has been without competition from another local standard broadcast station since its establishment. Only by making available a choice between local programs and stations can competition between such stations be achieved. Only by a grant of the Easton application, as ordered by the Commission, may such choice and competition be realized.

CONCLUSION

THEREFORE, inasmuch as the Commission has complied with all statutory and judicial requirements, and as there has been no showing that its findings and conclusions were arbitrary, capricious, or otherwise improper, the decision of the lower court reversing and remanding the case was erroneous and should itself be reversed.

Respectfully submitted,

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